

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
BONNIE VERBURG, : Docket #1:19-cv-10837-
 : JGK-GWG
 :
 Plaintiff, :
 :
 - against - :
 :
 SCHOLASTIC INC., : NEW YORK, NEW YORK
 : March 31, 2021
 :
 Defendant. :
 : TELEPHONE CONFERENCE
 ----- :
 :

PROCEEDINGS BEFORE
THE HONORABLE JUDGE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: This is the matter of Bonnie Verburg versus Scholastic, Inc., docket number 19-civ-10837. Counsel, state your name, please, starting with plaintiffs.

MR. DONALD CONKLIN: Sure. This is Donald Conklin from Mandel Bhandari on behalf of plaintiff, Bonnie Verburg.

MR. RISHI BHANDARI: This is Rishi Bhandari, also of Mandel Bhandari, for Bonnie Verburg.

MR. AARON WARSHAW: Good morning, this is Aaron Warshaw from Ogletree Deakins on behalf of the defendant.

HONORABLE GABRIEL W. GORENSTEIN (THE COURT): Okay, so when I set up this conference, I did it based upon the letter I got, docket number 61. Had I read the defendant's letter before last night, which I hadn't, I would have asked that Mr. Pilkey's attorney be told about this conference, at a minimum, just to, you know, give him the opportunity to send a letter. So I'm sort of inclined just to adjourn. I mean, I'm willing to hear from plaintiffs on this. There doesn't seem to be a downside.

MR. CONKLIN: Sure, your Honor, we're happy to, you know, adjourn if that's what the Court thinks is necessary. But, in short, I think that the letter says our case, that the Welsh Act allows for subpoenas on United States citizens residing in foreign countries so long as it complies with Rule 4(f) and we meet the criteria for

1 service under Rule 4(f)(3). It doesn't require a party to
2 serve process by the Hague Convention or assent to do so
3 before the Court permits alternative service. And I think
4 that we have grounds for alternative service here,
5 particularly in light of the conversations with defendant's
6 counsel about their willingness to accept the subpoena on
7 his behalf in exchange for delaying his deposition, which
8 was later rescinded after we had already postponed the
9 deposition. But he's as relevant witness, his testimony is
10 important to defendant's defenses that the plaintiff was
11 terminated for performance reasons and for making an
12 insufficient contribution to Scholastic. And his testimony
13 will speak to the quality of her work, explain the
14 circumstances of him and plaintiff no longer working
15 together as editor and author, which we think is --

17 THE COURT: If I can just -- I mean, I don't want
18 you to repeat the application in the letter, which I assure
19 you I've read. I'm asking a process question; and if your
20 answer to the process --

21 MR. CONKLIN: Oh, understood.

22 THE COURT: -- question is my application is so
23 obviously good, there's no need to hear any opposition
24 because there's no possible opposition, I'm basically
25 rejecting that because I can say that about every motion

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2 that arrives on my desk. If you read just one side --

3 MR. CONKLIN: No, I think --

4 THE COURT: -- it looks like a sure winner. So --

5 MR. CONKLIN: Understood.

6 THE COURT: -- it sounded like you didn't have an
7 objection to the process. Who is this person, by the way?

8 MR. CONKLIN: We did not -- Mr. Pilkey or his
9 counsel that's not on the call today?

10 THE COURT: No, who is he or she?

11 MR. CONKLIN: Dav Pilkey is a children's book
12 author --

13 THE COURT: No, no, no, no. Who is the counsel
14 for this person? Someone says this person --

15 MR. CONKLIN: Mr. Warshaw may be able to speak to
16 that.

17 MR. WARSHAW: Thank you, your Honor. And just by
18 way of background, I provided the contact information for
19 the representative back in December of last year. His name
20 is Jamie Coghill, C-o-g-h-i-l-l. And, certainly from the
21 defendant's perspective, no objection to adjourned --

22 THE COURT: Is that a he or a she?

23 MR. WARSHAW: It's a he, it's a he.

24 THE COURT: And is he with a firm?

25 MR. WARSHAW: He is. I believe it may be a solo

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2 practice. But I can, if you give me one moment, your
3 Honor -- I apologize. I don't have it at my fingertips.
4 Yes, he is. It's Surpin, S-u-r-p-i-n, Mayersohn, M-a-y-e-r-
5 s-o-h-n, and Coghill, C-o-g-h-i-l-l, LLP.

6 THE COURT: What's his last name? I'm sorry,
7 spell it again.

8 MR. WARSHAW: Sure. It's Coghill, C, as in cat,
9 o --

10 THE COURT: C-o-g-h-i-l-l?

11 MR. WARSHAW: C-o-g-h-i-l-l, correct. And it's J-
12 a-m-i-e.

13 THE COURT: Do you have a phone number there?

14 MR. WARSHAW: Yes. It's 310-552-2407. That's his
15 office number.

16 THE COURT: Did you inform him of this proceeding
17 today?

18 MR. WARSHAW: I did. And in the interest of
19 candor, I spoke to him as recently as this morning. He was
20 aware of it, also aware that he wasn't directed to appear.
21 There was no, you know, no attempt to hide the ball, but --

22 THE COURT: I'm just going to call him and see if
23 he's interested in appearing. So just stay on the line. I'm
24 going to use another phone here. You'll probably hear some
25 of it.

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[Judge places phone call as follows.]

THE COURT: Mr. Coghill? Hi. It's Judge Gorenstein in the Southern District of New York. How are you?

Okay, good. I know you're not expecting this call. We're on the record right now in the case of Verburg against Scholastic, where the plaintiff is seeking Mr. Pilkey's testimony. So here's my question. We have a couple of choices. One is we can deal with the application, which is for alternative service -- I think you're aware of it -- without your involvement; we can have you write a letter and reconvene our conference; you can dial into our conference right now and say whatever it is you want to say. Which of those do you like?

Okay. Do you want me to give you the three choices again?

Okay, I'll do it over again. The plaintiff in this case is seeking the testimony of your client, Mr. Pilkey. And the issue now is should alternative service for a subpoena be permitted; you know, any issues about, you know, relevance or burden or anything else, that's reserved for a later time, if you wish. That's the only issue before me. I'm in the middle of a conference right now. It's been suggested that I should seek your participation. And you have three choices. You can say,

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"You know what, you do whatever you want to do, Judge, based on your record, and I don't need to participate." You can say, "I would like to participate, and I'd like to file a letter in advance in response to the application and then be heard at a conference later on." Or you could dial into the conference right now and do whatever it is you want to do orally.

Well, it might matter, actually. Well, that may affect -- by the way, the other sides, I don't think they can hear your response. You just said -- hold on, hold on, hold on. The other side is listening to me, but I don't think they can hear you.

And what Mr. Coghill said is that he's not admitted to practice in New York or before this Court, I assume.

So, anyway, go ahead. Right. It doesn't really, because I would admit you *pro hac vice* if you wanted to be admitted, I mean, just for this proceeding, so that -- I'm not -- I guess yes, you would in a sense. I could consider you *amicus curiae*, I suppose. You know, if you did appear, just so you know, I would probably ask you about your contract with Mr. Pilkey because that might affect how I authorize any alternative service. But it's completely your choice. It's no problem if you don't want to -- hold

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on. I'm going to finish. Let me just finish. It's no problem if you simply don't want to appear at all. It's no problem if you want to think about it and get back to me, although I won't give you very long to think about it because I kind of have to move my case along. It's no problem if you just want to get on the line and talk it out further on the record. So what do you think?

Communicate the email through his wife. Okay. And he's responsive to your email? Through his wife. Okay. All right. Thank you. That's very helpful to us.

Okay. But in terms of my three choices, would you rather just stay out of it, then; is that what you're telling me?

Okay. And you don't want to get on the record and say all this? Because there would be a little -- because I don't think I can really consider what you're saying now unless you're on the record saying it. So the thing I am going to consider, just so you know, and I'm going to repeat it on the record now, is that you have no contact with him by phone or mail; the only way you have contact with him is by email. The email is actually to his wife, and his wife's email address, right -- his wife's -- you contact him through his wife's email address. She is responsive to your emails, and she purports to be

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2 responding on behalf of Mr. Pilkey; is that right?

3 Okay. Yes -- I just got a yes from him. So that
4 part now is on the record, and that is part of our record.
5 I just want you to know that. But the other stuff in terms
6 of, you know, due process and your views on that, I'm not
7 going to consider that because you're not willing to appear
8 on the record.

9 Okay. All right. Anything else that you want to
10 say to me? This has been very helpful.

11 Okay. Okay. Okay. Thank you so much. I appreciate
12 it. Okay. Bye-bye.

13 [End telephone call.]

14 THE COURT: Okay, folks, obviously you heard
15 everything I said. Were you able to hear what he was
16 saying?

17 MR. CONKLIN: No, your Honor.

18 MR. WARSHAW: We weren't able to.

19 THE COURT: I repeated everything material and --
20 at least that I'm considering. He did not want to appear,
21 he did not want to file a letter. So we don't need to
22 adjourn the conference, so that's good.

23 And I guess I've essentially heard plaintiff on
24 their application because I read their letter, and they
25 were making the same arguments just now.

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Anything the defendant wants to say?

MR. WARSHAW: No, your Honor. I was just pointing out, but I think it's probably moot, but just that plaintiff to have Mr. Coghill's contact information, obviously, he's responsive to picking up the phone. And, you know, my understanding is he'd never reached out to him. So I just say that to put on the record as further information.

THE COURT: Have you had any direct contact with Mr. Pilkey?

MR. WARSHAW: Your Honor, I have not. And, you know, I can explain of further explain the representation as to accepting service. It was a misunderstanding through telephone, regrettable, something that I wish I could take back or undo because I know it's caused additional strain on this. But the intent all along from defendants has been to try to facilitate in good faith to the extent that we can; but, obviously, Mr. Pilkey isn't represented by my firm and is pretty clearly not under defendant's control.

THE COURT: Okay. So you've never had direct contact with him or his wife?

MR. WARSHAW: I have not, your Honor.

THE COURT: Okay. All right. Okay. So I'm going to grant the application. I think there's not the least bit

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of doubt that Mr. Coghill was able to contact Mr. Pilkey, given his statements to me. So I'll issue an Order that provides for alternative service in the Rule 45 subpoena on Mr. Pilkey. And I'll probably --

MR. WARSHAW: Your Honor, in the --

THE COURT: -- get that out today.

MR. WARSHAW: This is Aaron Warshaw. I apologize. And it may be a technicality, but part of defendant's response letter was that the alternative service should be directed to Mr. Coghill, not Ogletree. Obviously, he --

THE COURT: That's my plan. That's my plan.

MR. WARSHAW: Okay. Thank you, your Honor.

THE COURT: All right. Do you have -- I assume you have -- I mean, I have a phone number; we just got it on the record. I assume you have an email address, somebody, for this person?

MR. WARSHAW: This is Aaron Warshaw. I do, and I've provided it to the plaintiff's counsel, and I'm happy to send it again.

THE COURT: Okay, and there's a street address for his firm?

MR. WARSHAW: Correct, your Honor.

THE COURT: Okay, so I'm going to issue an Order that requires service by all three means, phoning him -- I

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mean, well, let me put it this way. I guess you can't serve by phone. Service by email and by mail, but also require that a phone call be made indicating that an email was sent and that the subpoena was mailed. And you should also include a copy of my Order. If it hasn't come out in the next day or two, you'll send me a letter reminding me.

MR. CONKLIN: Understood, your Honor.

MR. WARSHAW: Thank you, your Honor.

THE COURT: Anything else from the plaintiff's point of view?

Let me just -- I don't want to repeat it in the Order; let me just give my reasons or potentially the reasons that were outlined in the plaintiff's letter. I've written on this issue; I think it's cited by somebody. *Elsivere v. Yi Chu*. Is that my case?

MR. CONKLIN: Yes, your Honor.

THE COURT: It sounds familiar. Okay. Good. *NGLG Life Tech*, I've also -- that I know is my case. There's nothing that requires anyone to exhaust some other remedy, and Hague Convention service isn't possible here. By the way, this is for plaintiffs, in your letter, page 4 of 5, paragraph at the bottom that says "second." Do you see that?

MR. CONKLIN: Yes.

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THE COURT: Do you see the second sentence, "While Japan has objected to service by email," did you mean email or did you mean something else?

MR. CONKLIN: I meant mail.

THE COURT: Okay.

MR. CONKLIN: Plaintiff certainly has not objected to service by email. Apologies, your Honor.

THE COURT: Okay. No problem.

So, as I said, nothing in Rule 4(f) requires a party to use Hague Convention service -- it wouldn't even be possible here because we don't have an address for this individual. There is no international agreement that prohibits alternative service that anyone has pointed to. I think there's certainly due process here because I haven't the slightest doubt that Mr. Coghill will transmit to Mr. Pilkey this subpoena, and it seems to be the only way to serve a subpoena on him.

Now, just as a matter of belt and suspenders, Mr. Pilkey, I assume, still has a relationship with your client, Mr. Warshaw, in terms of an editorial relationship?

MR. WARSHAW: He does, your Honor.

THE COURT: Are they in communication with him?

MR. WARSHAW: The same method that Mr. Coghill described, in writing --

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2 THE COURT: Well, wait a minute. Hold on. Stop,
3 stop. I haven't asked for the method. Are they in
4 communication with him?

5 MR. WARSHAW: They are, your Honor.

6 THE COURT: Okay, and is it someone like an
7 editor, someone in their royalty office; who is it who's
8 communicating with him that you know?

9 MR. WARSHAW: Editors, your Honor.

10 THE COURT: Okay. I think to really wrap this up,
11 I'm going to order one of your clients to accept service
12 and send it to him. So do you want to give me the name of
13 an editor who's in contact -- or you know what, I can just
14 do the corporation.

15 MR. WARSHAW: That's fine, your Honor.

16 THE COURT: Who -- I assume that you would be
17 willing to pass along to the appropriate person at your
18 client who is in communication with him my Order?

19 MR. WARSHAW: That's correct, your Honor. Most
20 likely, it would be Ms. Berger, who's an individual
21 defendant. But I don't want to commit to that. So, you
22 know, to the extent that the Order indicates Scholastic,
23 I'll -- obviously, the Order will be followed that either
24 Ms. Berger or someone else that Scholastic thinks is --

25 THE COURT: Is he currently publishing with you?

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MR. WARSHAW: He is, your Honor.

THE COURT: Okay, and do they send -- are they responsible for providing royalty checks to him -- royalty payments to him?

MR. WARSHAW: I assume so, your Honor. I don't have direct knowledge, but I presume so.

THE COURT: Okay.

MR. WARSHAW: I do know, your Honor, that Ms. Berger and/or other editors would be in contact with him through the email address that his wife maintains.

THE COURT: Okay. All right, that provides an additional basis. And my Order's also going to direct service of the subpoena on Scholastic for transmission to Mr. Pilkey.

All right, and you're accepting service on behalf of Scholastic, right, Mr. Warshaw?

MR. WARSHAW: I am, your Honor.

THE COURT: Okay. All right, I think I've given the reasons, so I'm just going to issue a barebones Order.

Anything else on the plaintiff's side?

MR. CONKLIN: No, your Honor.

THE COURT: Anything from defendant?

MR. WARSHAW: No, your Honor.

THE COURT: Okay. Thank you, everyone.

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MR. WARSHAW: All right, thank you.

MR. CONKLIN: Thank you.

THE COURT: Good-bye.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Bonnie Verburg v. Scholastic Inc., Docket #19-cv-10837-JGK-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: April 1, 2021